

BEFORE THE BOARD OF OIL, GAS AND MINING

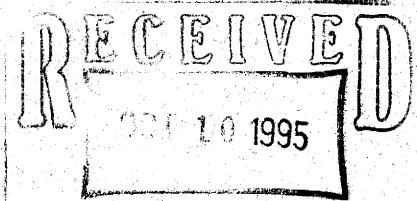
FILED

DEPARTMENT OF NATURAL RESOURCES

IN AND FOR THE STATE OF UTAH

OCT 10 1995

SECRETARY, BOARD OF
OIL, GAS & MINING



DIV. OF OIL, GAS & MINING

IN THE MATTER OF THE)
REQUEST FOR RE-HEARING AND)
MODIFICATION OF ORDER DATED)
JUNE 13, 1995, BY UTAH BOARD)
OF OIL, GAS AND MINING IN THE)
MATTER OF THE REQUEST FOR AGENCY)
ACTION AND APPEAL OF DIVISION)
DETERMINATION TO APPROVE)
SIGNIFICANT REVISION TO PERMIT)
TO ALLOW MINING OF TANK SEAM BY)
CO-OP MINING COMPANY BY)
PETITIONERS NORTH EMERY WATER)
USERS ASSOCIATION,)
HUNTINGTON-CLEVELAND IRRIGATION)
COMPANY, AND CASTLE VALLEY)
SPECIAL SERVICE DISTRICT, CARBON)
COUNTY, UTAH.)
)

CAUSE NO.

ACT/015/025-93B

DOCKET NO. 94-027

WEDNESDAY, SEPTEMBER 27, 1995, COMMENCING AT THE HOUR OF
10:00 A.M., A HEARING WAS HELD IN THE ABOVE MATTER BEFORE
THE BOARD OF OIL, GAS, AND MINING, 355 WEST NORTH TEMPLE,
3 TRIAD CENTER, SUITE 520, SALT LAKE CITY, UTAH
84180-1203.

INTERMOUNTAIN COURT REPORTERS
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REPORTED BY:
KELLY SOMMERVILLE, CSR, RPR

ORIGINAL

1 APPEARANCES:

2

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4 CHAIRMAN: DAVE LAURISKI

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7 BOARD MEMBERS: RAYMOND MURRAY

8

JAY CHRISTENSEN

9

KENT STRINGHAM

10

JUDY LEVER

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THOMAS FADDIES

12

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STAFF MEMBERS:

14 JANICE L. BROWN, Secretary of the Board

JANEAN BURNS, Legal Secretary

15 THOMAS A. MITCHELL, Assistant Attorney General

JAMES W. CARTER, Director, Division of Oil,

16 Gas and Mining

RONALD J. FIRTH, Associate Director of Oil and Gas,

17 Division of Oil, Gas and Mining

LOWELL P. BRAXTON, Associate Director of Mining,

18 Division of Oil, Gas and Mining FRANK R.

MATTHEWS, Petroleum Engineer

19 BRAD G. HILL, Geologist

RON DANIELS, Coordinator of Minerals Research

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1 September 27, 1995

10:00 a.m.

2 P R O C E E D I N G S

3 MR. LAURISKI: Good morning. Welcome to the
4 September hearing for the Board of Oil, Gas and Mining.
5 We have two agenda items on the docket today, and we'll
6 go ahead and jump right in.

7 The first agenda item is in Docket Number 94-027,
8 Cause No. ACT/015/025-93B -- Request for Re-Hearing and
9 Modification of an Order Dated June 13, 1995, by the
10 Utah Board of Oil, Gas and Mining in the Matter of the
11 Request for Agency Action and Appeal of Division
12 Determination to Approve Significant Revision to Permit
13 to Allow Mining of Tank Seam by Co-Op Mining Company by
14 Petitioners North Emery Water Users Association,
15 Huntington-Cleveland Irrigation Company, and Castle
16 Valley Special Service District, Carbon County, Utah.
17 This matter was continued from our August 23 hearing.

18 Before we start in some of the discussions, this
19 board is simply going to consider the matter for your
20 request for re-hearing in a modification of the order.
21 That doesn't mean we're here to take new evidence.
22 We're here to decide whether or not we should grant you
23 a re-hearing and a modification to the existing order.
24 And hopefully we can confine the arguments to that
25 specific request of the Water Users.

1 And with that, I would ask counsel to announce their
2 appearance for the record, please.

3 MR. APPEL: Jeffrey Appel on behalf of Castle
4 Valley.

5 MR. SMITH: Craig Smith on behalf of North Emery
6 Water Users and Huntington-Cleveland Irrigation Company.

7 MR. MITCHELL: Tom Mitchell on behalf of the
8 Division of Oil, Gas and Mining.

9 MR. HANSEN: Mark Hansen on behalf of the Co-Op
10 Mining Company.

11 MR. LAURISKI: I would ask counsel if they agree
12 with the chair's reading of this request that we're not
13 here to consider new facts. We're here to consider the
14 facts that are presented in the order that was given as
15 a result of the hearing.

16 MR. MITCHELL: The state is in agreement.

17 MR. LAURISKI: Okay.

18 MR. HANSEN: Co-Op Mining agrees.

19 MR. APPEL: We agree, your Honor.

20 MR. SMITH: We do as well, Mr. Chairman.

21 MR. LAURISKI: Thank you very much. And with that,
22 do you want to proceed?

23 MR. APPEL: Thank you. In its brief, Co-Op
24 suggested that there is no right of re-hearing, which is
25 one of the fundamental purposes we're here for today.

1 And they rely upon rule 645-301-212-300, which within
2 its text does not require a re-hearing.

3 Our view on that is that the general provisions
4 contained in and set forth in rule 641 et seq. would
5 control. Specifically, 641-110 governing re-hearing.
6 The reason for that, the scope of these particular
7 general rules indicate that they will govern all
8 proceedings before the Board of Oil, Gas and Mining or
9 any hearing examiner designated by the board. These
10 rules provide the procedures for formal adjudicated
11 proceedings. The rules for informal adjudicated
12 proceedings are under coal program rules, oil, gas and
13 conservation rules, and the mineral rules. This is
14 certainly a proceeding before the board.

15 As to our request for a re-hearing and modification
16 of existing orders, it discusses the time for filing,
17 any person affected by a final order, which this surely
18 is, or decision of the board may file a petition for
19 re-hearing. Unless otherwise provided, a petition for
20 re-hearing must be filed no later than the 10th day of
21 the month following the day of signing of the final
22 order or the decision for which the re-hearing is
23 sought.

24 It is our view that this general statement
25 concerning procedure will govern in this particular

1 instance. I will add that before filing this, we
2 telephoned Mr. Anders, your former counsel, and
3 discussed this with him, and he indicated he would
4 follow these particular procedures. So it was
5 additionally on reliance of those conversations with
6 him.

7 On to the more substantive aspect for this and the
8 reason for the request. This particular proceeding we
9 went through before was noticed as a review of the tank
10 seams. Initially, before we reached any substance or
11 took any evidence, you entertained motions as to
12 relevance, collateral estoppel. We submitted that the
13 evidence would be produced on a contextual and
14 background basis. This would have to do with the
15 legality.

16 The board has later ruled in its order that the
17 Blind Canyon seam's stratigraphy in much of this was
18 irrelevant and not necessary to its determination
19 regarding the tank seam, with which I tend to agree.
20 But the background certainly would have been useful.

21 To remind you, there were countless objections to
22 the introduction of that evidence throughout. I can
23 state affirmatively to you their evidence was tailored,
24 and our cross-examination was reduced to those limited
25 purposes. You folks limited the field to the tank

1 seam.

2 If we knew we were adjudicating the lower
3 stratigraphy and the effect of the movement of water in
4 the blind canyon seam, then our case would have been
5 entirely different. But it was limited by agreement of
6 us, by a statement by the board, which is in the
7 transcript, and basically by stipulation of counsel. We
8 thought we understood what we were producing.

9 The renewal proceedings for that particular mine are
10 upcoming. Our concern is that these findings which were
11 not necessary, and you've ruled were irrelevant with
12 respect to the blind canyon seam, will bind us in the
13 renewal proceedings. We don't think this is fair. We
14 have an entirely different case ready to present to
15 those particular proceedings. And there will be a far,
16 far more thorough cross-examination of their experts.

17 The cross-examination that I personally undertook
18 was to attempt to show you that their theories didn't
19 work in general to effect their credibility. But I
20 would have spent far more time with them on specific
21 theories if I'd known we were dealing with the hydrology
22 within that lower mine. And, again, that wasn't
23 noticed.

24 So in summary, we believe you initially limited the
25 field of inquiry by the terms of your own notice, by the

1 stipulations of counsel, by the board chairman and the
2 board's statement at the beginning of the hearing as to
3 what we were going to consider, and by the terms of the
4 order itself.

5 The problem is that in this order you've gone beyond
6 that, entered the field you limited, used evidence that
7 you ruled is irrelevant, and affected the subject matter
8 that's more properly a part of a pending proceeding in
9 the case in the renewal of the lower mine. We don't
10 believe you have the jurisdiction to do that, and we
11 would be horribly prejudiced if you do. Thank you.

12 MR. LAURISKI: Thank you.

13 MR. SMITH: Mr. Chairman, if I could just add just
14 briefly to Mr. Appel's comments. What we're here for
15 today is, I think, where we made it fairly clear, we're
16 not here asking to re-open and re-hear this whole
17 thing. Sure it's a request for a re-hearing
18 modification. We believe there just needs to be a
19 modification of the board's ruling.

20 I guess we understand that where the board's coming
21 from in the ruling. We certainly believe that there was
22 a broader scope that needed to be looked at, and we've
23 lost on that issue. And we understand that. We're not
24 here to try to re-open everything, other than the fact
25 just to make corrections in the ruling that we think are

1 necessary because of the jurisdictional limits the board
2 has placed on itself.

3 As Mr. Appel stated, throughout the hearing there
4 was questions and concerns by the board about the scope
5 of its jurisdiction in this matter. And those were
6 raised and we argued what we believed the scope of
7 jurisdiction was, and what should be looked at. But
8 ultimately it's for this board to determine what its
9 jurisdiction is. And the board's made that
10 determination, and we can certainly live with that and
11 understand that ruling.

12 What we can't live with and understand is once that
13 jurisdictional determination is made, it's for the board
14 then to go beyond its own determination of its
15 jurisdiction, and make findings outside of that, what it
16 perceives to be its jurisdiction. It's somewhat of a
17 technical matter, but I think a very important matter.
18 Threshold determination of any board or court is to
19 determine what its jurisdiction is, what things are
20 properly before it that it can rule on.

21 The board's made that determination. We understand
22 that, and like I said, we can live with that. That's
23 your job as the board is to make that threshold initial
24 determination. However, once that determination is
25 made, matters that fall outside of what you determine to

1 be your jurisdiction, are not properly included as part
2 of your ruling to make factual findings. The reason it
3 is, is if you don't have jurisdiction, you have no basis
4 to make any further findings other than, we don't have
5 jurisdiction.

6 So we have pointed out certain portions of the
7 memorandum that we believe fall outside of the
8 self-determined jurisdiction of this board. I just
9 point out the board's ruling. The board, therefore,
10 does not believe it is relevant to consider the
11 hydrologic impacts of existing mining in the permit
12 area. That's the determination that's made, yet then
13 the ruling goes on to make factual findings in that
14 area.

15 And I guess it's our bottom-line position on this
16 thing, and we think it's well supported by the case law
17 support provided in our brief and in the rules of this
18 board, is that once that jurisdictional ruling is made,
19 everything that falls outside of the jurisdiction, that
20 you determine falls outside of your jurisdiction for
21 that hearing, becomes irrelevant and should not be
22 included in your findings of facts or conclusions of
23 law.

24 And so what we're here for today is simply to ask
25 that you modify your findings of fact and conclusions of

1 law. That those matters that were outside of the issues
2 that you believe were properly before you and which you
3 had jurisdiction to rule be deleted from that ruling.
4 And as Mr. Appel said, there are other opportunities for
5 us to have the review of those things, and when it's
6 properly before the board, we'll raise those.

7 What we don't want to be is in a position, which we
8 think is an error of law, is to both say, We don't have
9 jurisdiction to rule on this, but by the way, here's our
10 ruling on this. And that's, you know, in a nutshell,
11 that's our position. And that's what we're here for to
12 ask today, to save everyone time and effort and clarify,
13 and bring your ruling within the jurisdiction that
14 you've determined. Thank you, Mr. Chairman.

15 MR. LAURISKI: Thank you. Before you start, Mr.
16 Mitchell, I have a question just so I'm clear and
17 hopefully that this makes it very clear to the board. I
18 have a question in that we're here to talk about seeking
19 the board to modify its order. As I understand, you're
20 asking the board to modify its order to consider only
21 evidence that's relevant to mining of the tank seam.

22 MR. APPEL: That's correct.

23 MR. LAURISKI: Okay. The next question is, is what
24 purpose then would we gain from a re-hearing? What
25 would you intend to do by re-hearing this matter?

1 That's part of your request here now.

2 MR. APPEL: The request for re-hearing is to simply
3 point out to you the paragraphs that we think should be
4 deleted and excised from your order.

5 MR. LAURISKI: Okay. All right. Okay. Thank you.
6 Mr. Mitchell?

7 MR. MITCHELL: Mr. Chairman, members of the board, I
8 think we can all agree on one thing, that had this been
9 the position of the petitioners to begin with, we would
10 have been here considerably less time when we last
11 considered this matter. My recollection, and I have
12 seen nothing in the pleadings from my review of the
13 record to convince me otherwise, is that the only
14 stipulation that eventually was reached by counsel, or
15 agreement was reached by counsel in those long hours,
16 was that there was apparently no water in the tank seam,
17 and any appreciable amount that could be impacted. And
18 had indeed that stipulation been before the board, and
19 this position of the petitioners' been before the board,
20 I would submit the entire hearing would have taken place
21 in under ten minutes. But that was not the position.
22 And I still don't think it's the position of the
23 petitioners.

24 The position of the petitioners is they have a
25 theory of the case, and their theory of the case makes

1 relevant the dewatering of the Blind Canyon seam. They
2 said not once, but numerous points, every time there was
3 an objection raised by either Co-Op's counsel or myself,
4 or a question raised by the board as to why we were
5 talking about the Blind Canyon seam, that the basis, the
6 theory of the damage that they would suffer because of
7 mining in the tank seam would be that the Blind Canyon
8 seam would continue to be dewatered. And all of the
9 evidence that they put on, their expert testimony was
10 directed not at the tank seam, it was directed at
11 dewatering in the Blind Canyon seam.

12 Two points I hope you remember from that hearing.
13 One was, when that was stated about as clearly as could
14 possibly be stated by Mr. Smith, which I've quoted in my
15 response of pleading, I remember Chairman Lauriski
16 saying, I understand.

17 The other point I hope you will recall is that the
18 consistent position of the division and Co-Op, you may
19 recall, the division, in reliance upon what it thought
20 was the narrow issue, did not intend to put on any
21 testimony about the Blind Canyon seam. We asked for a
22 recess where we tried to figure out, because we couldn't
23 get any stipulation or clear evidentiary ruling at the
24 time, as to whether information concerning the Blind
25 Canyon seam was going to be relevant.

1 Indeed, the board's ruling was, we will only not
2 consider that evidence related to the Blind Canyon seam,
3 that's not relevant to the activities in the tank seam.
4 Now, the board has issued an order directly related to
5 the plaintiffs' petitioners' theory of the case which
6 is, if mining takes place in the tank steam, the Blind
7 Canyon seam will continued to be dewatered.

8 If you, now at this point, determine that the
9 petitioners should change their theory of the case,
10 should throw out all evidence relevant to the theory of
11 their case, I think you do a disservice to yourselves
12 and to the resources of everyone involved in this
13 matter.

14 The narrow issue in front of you is, do you have
15 jurisdiction to consider the facts that were in front of
16 you concerning dewatering of the mine seam, of the Blind
17 Canyon seam, while mining continues in the tank seam?
18 That was their theory, they asked to put it on, you
19 allowed them to put it on, we ended up responding to it,
20 and you have a ruling which is clearly within your
21 subject matter jurisdiction to the extent that
22 dewatering of the Blind Canyon seam is not relevant to
23 mining in the tank seam. Then I think your order
24 adequately takes care of that. The reach of your order
25 only goes as far as their requested relief and their

1 theory of the case.

2 Your order, I believe, is well within your
3 jurisdiction. You certainly had the basis in front of
4 you to make findings of fact given that your record
5 totally supports your decision. And the creation of
6 that record was not of your own making. The creation of
7 that record was put before you by the parties based upon
8 the plaintiffs' theory of the case, which the plaintiffs
9 apparently, I think one has to concede, are entitled to
10 their theory of the case. Thank you.

11 MR. LAURISKI: Thank you. Mr. Hansen?

12 MR. HANSEN: I agree with most of what Mr. Mitchell
13 has stated. I have a couple of differing views on some
14 of the matters. The way I view this case, the
15 respondents proceeded forward on two different
16 theories. The first theory, as Mr. Mitchell said, that
17 mining the tank seam would allow Co-Op Mining to
18 continue to mine in the Big Bear seam. That their
19 springs were being impacted by that mining activity in
20 Big Bear, and allowing the mining of the tank seam would
21 continue to allow that activity to take place, which
22 itself was the impact that they were objecting to.

23 They also proceeded forward on a second theory,
24 which was that mining of the tank seam would itself
25 impact their springs. And they presented their evidence

1 on that case. A good part of that evidence was that
2 mining the tank seam would allow contaminants to be
3 introduced into the aquifer, that those contaminants
4 would eventually migrate into the Big Bear seam, and
5 from there would impact their springs.

6 And so they were proceeding on two different
7 theories of the case. And as I read the Court's ruling
8 on the relevance of the evidence, the way I see it, the
9 Court, or the board, ruled that the evidence was not
10 relevant under the first theory of the case, because
11 Co-Op Mine would be allowed to continue mining the Big
12 Bear seam in any event. But that that evidence was
13 relevant on the issue of whether the mining of the tank
14 seam itself would directly impact their springs.

15 There was evidence presented on that issue. Their
16 own expert testified that the mining of the tank seam
17 would allow contaminants to be introduced into the
18 aquifer, that those contaminants would migrate or dip
19 down into the current workings in Big Bear, and from
20 there into their springs.

21 Co-Op Mine presented evidence showing that that was
22 not the case. If -- even if accepting the respondents'
23 argument, and in light of the board's ruling on the
24 relevance of that evidence, that evidence is not
25 relevant to prove the first theory. It is relevant to

1 prove or disprove the second theory. And I believe the
2 board so found and made its findings based on that
3 point.

4 The respondents have said that had they understood
5 what was really going on in the hearing, they would have
6 presented their case much differently. Specifically,
7 Mr. Appel said that he would have cross-examined Co-Op
8 Mine's witnesses much differently. I personally don't
9 find that argument to be too credible. The respondents
10 had every possible incentive to discredit Co-Op Mine's
11 experts every way they could, and to present as much
12 evidence as they had on the case. There was an
13 exhausting amount of evidence presented.

14 Aside from the general statement that was made by
15 Mr. Appel, the respondents haven't even suggested, much
16 less proffered, what evidence would be different had
17 they proceeded in the manner that they suggest, or how
18 that evidence may have changed the board's findings or
19 rulings.

20 I've raised some waiver and estoppel arguments in my
21 brief. I believe those issues have been adequately
22 briefed, and don't intend to go over them at this
23 point. I would point out, again, the central point that
24 I raised in my brief, which is that the board is
25 required by law to make findings of fact and conclusions

1 of law adequate to support their decisions. And I've
2 cited the case law that's put on this record, Adams
3 versus Board of Review, 821 Pacific 2d 1, which outlines
4 what an administrative board's obligations are regarding
5 the making of findings of facts. And the board not only
6 has the right, it has the obligation to make subsidiary
7 findings in sufficient detail that the critical,
8 subordinate, factual issues are highlighted, and
9 resolved in such a fashion as to demonstrate that there
10 is a logical and legal basis for the ultimate
11 conclusions.

12 I would submit that that is exactly what the board
13 has done here; that those findings are relevant to the
14 respondents' second theory of the case as I have
15 outlined; that they're entirely within the board's
16 jurisdiction to make those findings and the board's
17 order should stand as it now exists. Thank you.

18 MR. LAURISKI: Thank you, Mr. Hansen. Any response
19 gentlemen?

20 MR. APPEL: Yes. Thank you. I'm somewhat
21 confused. Well, I guess I'm not confused, because
22 there's a possibility that something can come from the
23 prior order that wasn't intended. Let me quote you Mr.
24 Mitchell's view about the jurisdiction of what we were
25 considering.

1 Consequently, the narrow issue in front of the board
2 today is whether or not the information is relevant to
3 new activity in the tank seam. I would submit that if
4 the evidence reflects upon existing mining within the
5 existing permit, within the existing coal seam, that the
6 evidence is not relevant unless it can be shown the
7 mining in the tank seam will change. Not just that we
8 have opinions about the tank seam based upon what
9 occurred in existing mining of the lower seam, but that
10 mining in the tank seam will make a difference in the
11 effect on that interest. Otherwise, the objection
12 really goes to the existing permit. And that's not what
13 this thing has been noticed up about, which concerns the
14 interrelationship between evidence on the Blind Canyon
15 seam in the lower stratigraphy, and the mining in the
16 tank seam. What the case was about at that time, were
17 impacts created on our springs by the tank seam, which
18 the board has determined did not exist. That required
19 some findings which have gone far beyond that.

20 Continuing with Mr. Mitchell, on page 14, Otherwise
21 we're re-opening the issue of whether or not the permit
22 should have been renewed for existing mining within the
23 existing seam. Well, we were told we weren't going to
24 do that. We agreed we wouldn't do that, and I'll tell
25 you where we said that.

1 The board, after hearing these arguments, quoting
2 Mr. Lauriski, Given the motion and the board's order, we
3 find the timeliness motion to be granted basically.
4 Thereby that resolves the issue of collateral estoppel.
5 However, I want to point out in the board's
6 deliberations that the issue before us today relates to
7 the significant revision of the mining permit issue to
8 Co-Op in early July of this year. And the board in its
9 deliberations determined that we would only consider
10 evidence as it relates to the impact of the mining of
11 the tank seam.

12 However, if the petitioners needed to lay foundation
13 by raising issues that related to current mining and the
14 negative impacts, they can show that relationship as it
15 exists, as it might impact the tank seam. Just for the
16 record, I want to read in how this was noticed so that
17 everybody understands the framework for which we'll
18 conduct this hearing. The purpose for this proceeding
19 will be for the board to consider the objection of the
20 petitioner to the division for the determination of
21 approving all mining companies' significant revision to
22 extend its mining operations in the tank seam. That is
23 also what appears in the petitioners' motion for this
24 hearing. And so that's how we're going to conduct the
25 hearing, by narrowing that focus as it relates to the

1 tank seam and impacted mining on the tank seam, okay?

2 At that point, we went around and it came back to me
3 and I stated, Thank you. I think it is important to
4 create the context to review this particular issue. And
5 I think the board did fairly resolve the procedural
6 issue. We weren't arguing with you about that at that
7 point. We suggested to you that it might get larger.
8 You told us it would not. This was early on in the
9 hearing before a witness was called. Our field was
10 limited. Our case was constrained. What this is about
11 today, is the case we were allowed to present. There
12 were objections all the way through the
13 cross-examination concerning the relevancy. I remember
14 Mr. Lauriski stating to me, How does this relate to the
15 tank seam? And I told him that it would. Throughout
16 this, our entire presentation was limited, and we agreed
17 to that limitation up front.

18 To suggest that we're adjudicating on finding facts
19 and conclusions concerning the lower stratigraphy simply
20 isn't fair. We haven't had our day before you on that.
21 And I really don't care how Mr. Hansen views the next
22 hearing, because I can tell you, and I have told you,
23 that it would be entirely different. You will have
24 additional evidence. There are other witnesses we would
25 call, because it was simply background and contextual.

1 We used their witnesses. We used one of ours. It's a
2 different issue and it's a different set of facts of
3 what's coming in a matter of months on the renewals.
4 And we're entitled to present our case on that.

5 The problem we have with the order is it constrains
6 us and could be used against us. And it was beyond the
7 jurisdiction of what you had.

8 In summary, it was about the tank seam and its
9 impacts on us. It wasn't about the Blind Canyon seam.
10 It wasn't about how water moves through the Blind Canyon
11 seam. That's not critical to your findings.

12 Now, the cases Mr. Hansen cites, says that critical
13 subordinate factual issues can be used. These aren't
14 critical to the tank seam. All you need to know is
15 where the water goes through the tank seam and if it
16 hurts. The context we presented it in was because there
17 was an artificial connection created by Co-Op, the ramp,
18 which then turned into a shaft. They're taking the coal
19 out the lower seam. That's the tie between those two
20 seams. That's the only tie. Perhaps that's the basis
21 of confusion that relates to the two because they're
22 taking the coal out.

23 Therefore, one of the issues became, will any water
24 move down that artificial connection? We've talked
25 about that. You've resolved that against us. We can

1 live with that. If there are any questions, I'd be
2 happy to answer them.

3 MR. LAURISKI: Okay. Thank you, Mr. Appel.

4 MR. CHRISTENSEN: I have a question. Just a moment
5 ago, Mr. Smith I think it was, says that you were not
6 asking for a re-hearing, but a modification of the order
7 that was published; is that correct?

8 MR. SMITH: We're not asking to re-hear this issue.
9 What we're asking is to modify the order. Now, if you
10 need a hearing for us to point out what we think we have
11 in our briefs pointed out, the facts that we believe
12 should be deleted, we're happy to come and present
13 that. But that's all we're trying to present. We're
14 not trying to re-open the whole issue. That's correct.

15 MR. CHRISTENSEN: That's where I got confused,
16 because Mr. Appel was just talking about a re-hearing.

17 MR. APPEL: What I'm speaking about is that the
18 renewal of the permit for the Blind Canyon seam is
19 upcoming several months in the future, I believe.
20 That's the time when that ought to be done. That's when
21 we'll present our case on that. But, no. I'm sorry if
22 I've confused you. The only thing we're asking for is
23 modifications of your order. To the extent we could
24 assist you with a hearing, we'd be happy to do that.
25 I'm sorry for the confusion.

1 MR. LAURISKI: Mr. Smith?

2 MR. SMITH: Thank you, Mr. Chairman. I would submit
3 to this board that whatever theories we have are
4 irrelevant. That this board determines the jurisdiction
5 and this board has determined the jurisdiction. The
6 arguments of the division and Co-Op regarding what our
7 theories are really have no relevance once you rule on
8 your jurisdiction of what you are going to look at, and
9 you made that ruling. That's in points 4 and 6, in
10 conclusions 4 and 6. And if I can just read from the
11 ruling of this board, and that sets the jurisdiction,
12 not what I may argue or not what theories I may have.
13 What sets the jurisdiction of the board is the board
14 itself.

15 And in conclusion of law number 4 in your ruling,
16 Co-Op's application for significant permit revision
17 involved only a proposal to mine the tank seam. Co-Op's
18 current operations in the Blind Canyon seam are
19 authorized under the terms of Co-Op's existing permit,
20 which has not been challenged in this proceeding.

21 You've ruled on your jurisdiction. And all we're
22 saying is make the rest of your ruling consistent with
23 your jurisdictional ruling. That's all we ask. That's
24 all we ask for. The case law we pointed out, I think is
25 very clear, that once you make a jurisdictional ruling,

1 only matters within the jurisdiction of the board can be
2 part of that ruling.

3 Once something is determined to be outside of your
4 jurisdiction by you, that's the last ruling you can make
5 on that issue because it's outside of your
6 jurisdiction. You don't have jurisdiction to make
7 future rulings, and that's what we're concerned about.
8 You know, obviously we thought other things were
9 important at the hearing and we tried to bring those in
10 in the context that Mr. Appel said. But that's not
11 relevant. What's relevant is you've made a ruling on
12 jurisdiction. We're just asking that you make the rest
13 of your ruling consistent with your jurisdictional
14 ruling.

15 And what we've argued and what our theories were
16 have no relevance to this. The only thing that's
17 relevant is you've ruled on jurisdiction. We're here
18 saying, We're willing to live by that ruling. We have
19 to live by it, unless we appeal it. We're not
20 interested in appealing that ruling of jurisdiction. We
21 see the points you've made and that's the ruling. We're
22 here saying, That's fine. Let's just make everything
23 else in the conclusions and findings consistent with
24 your jurisdictional ruling. And that's the law on that
25 matter, and matters outside of your jurisdiction are not

1 appropriate to be determined, either factually or
2 legally by this board once you've said that they're
3 outside of your jurisdiction. You've made that ruling
4 and we just ask that you make it consistent. Thank you,
5 Mr. Chairman.

6 MR. LAURISKI: Thank you, Mr. Smith. The board will
7 recess now, and we'll begin our deliberations. If it
8 looks like we're going to be delayed, I'll come out and
9 let you know. If not, we'll try to get back to you with
10 an answer here shortly.

11 (A short break was taken.)

12 MR. LAURISKI: Okay. We're going back on the
13 record. The board has considered the petitioners'
14 requests and have considered the arguments, and the
15 board has reached a majority opinion to deny the
16 petitioners' request for re-hearing and modification in
17 this matter. And with that, we'll turn our attention to
18 the next issue. Thank you, gentlemen.

19 MR. MITCHELL: Will there be an order prepared?

20 MR. LAURISKI: Yes. I'll ask the board's counsel to
21 prepare an order.

22 (Whereupon the matter was concluded.)
23
24
25

1 STATE OF UTAH)

2

3 COUNTY OF SALT LAKE)

4

5 I, KELLY SOMMERVILLE, Certified Shorthand Reporter,
6 Registered Professional Reporter, and notary public
7 within and for the county of Salt Lake, State of Utah do
8 hereby certify:

9 That the foregoing proceedings were taken before me
10 at the time and place set forth herein, and was taken
11 down by me in shorthand and thereafter transcribed into
12 typewriting under my direction and supervision.

13 That the foregoing pages contain a true and correct
14 transcription of my said shorthand notes so taken.

15 In Witness Whereof, I have subscribed my name this
16 9TH day of October, 1995.

17

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Kelly Somerville
KELLY SOMMERVILLE, RPR
CERTIFIED SHORTHAND REPORTER

21 My Commission Expires:
22 June 22, 2998

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